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**UNITED STATES BANKRUPTCY COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

In re:

PROFESSIONAL FINANCIAL  
INVESTORS, INC., *et al.*,

Debtors.

Chapter 11

Case No. 20-30604

(Jointly Administered)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
CONFIRMATION OF SECOND AMENDED  
JOINT CHAPTER 11 PLAN OF  
PROFESSIONAL FINANCIAL INVESTORS,  
INC. AND ITS AFFILIATED DEBTORS  
PROPOSED BY THE DEBTORS AND  
OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS AND SUPPORTED BY THE AD  
HOC LLC MEMBERS COMMITTEE AND  
THE AD HOC DOT NOTEHOLDERS  
COMMITTEE (DATED MAY 20, 2021)**

Plan Confirmation Hearing:

Date: May 27, 2021

Time: 10:00 a.m. (Pacific Time)

Place: **Telephonic/Video Appearances Only**  
450 Golden Gate Avenue, 16th Floor  
San Francisco, CA 94102

Judge: Hon. Hannah L. Blumenstiel

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## I. INTRODUCTION

This Plan<sup>1</sup> is the product of unprecedented cooperation between a highly-organized investor body and the Debtors<sup>2</sup> and is overwhelmingly supported by the creditors who cast ballots. Nearly 2,200 votes, representing over \$461 million in claims, were received prior to the May 13, 2021 voting deadline. Nearly 99.8% of those votes, representing over \$457 million in claims, voted in favor of the Plan.<sup>3</sup> In total, only five (5) ballots rejected the Plan, representing less than \$1.5 million in claims.

This incredible level of Plan support is a testament to the hard work of numerous interested parties in these Chapter 11 Cases. Perhaps most notably, since even before the commencement of the Chapter 11 Cases, the investor body has played a critical role by organizing themselves to ensure their interests were well-represented. In addition, the Official Committee of Unsecured Creditors (the “OCUC”), and the Ad Hoc LLC Members Committee and Ad Hoc Committee of Deed of Trust Holders (together the “Ad Hoc Committees” and, collectively with the OCUC, the “Committees”) made extensive efforts to communicate with the respective constituencies regarding the Plan and the voting process. These efforts included participating in several Zoom meetings open to all Investors and in numerous other communications responding to Investor inquiries regarding the Plan and the voting procedures. The Debtors themselves also fielded

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<sup>1</sup> The “Plan” shall refer to the *Second Amended Joint Plan of Professional Financial Investors, Inc. and its Affiliated Debtors Proposed by the Debtors and Official Committee of Unsecured Creditors and Supported by the Ad Hoc LLC Members Committee and the Ad Hoc DOT Noteholders Committee (Dated May 20, 2021)* filed concurrently with this Memorandum. All capitalized terms used but not defined in this Memorandum shall have the meaning given to them in the Plan. On March 21, 2021, the Proponents filed their *Joint Plan of Professional Financial Investors, Inc. and its Affiliated Debtors Proposed by the Debtors and Official Committee of Unsecured Creditors and Supported by the Ad Hoc LLC Members Committee and the Ad Hoc DOT Noteholders Committee* as Dkt. No. 489 (the “Original Plan”). The Original Plan was superseded on April 9, 2021, when the Proponents filed their *Amended Joint Plan of Professional Financial Investors, Inc. and its Affiliated Debtors Proposed by the Debtors and Official Committee of Unsecured Creditors and Supported by the Ad Hoc LLC Members Committee and the Ad Hoc DOT Noteholders Committee* as Dkt. No. 554 (the “First Amended Plan”). Later, the First Amended Plan was superseded by the Plan.

<sup>2</sup> A complete list of the Debtors and their respective chapter 11 case numbers may be found at [www.donlinrecano.com/pfi](http://www.donlinrecano.com/pfi). The federal tax identification numbers of each of the Debtors is also available in the bankruptcy petitions of each Debtor, also available at the Donlin Recano website.

<sup>3</sup> As of May 20, 2021, twenty-nine (29) total ballots have been received after the voting deadline and such ballots are summarized on Exhibit B to the Burlacu Declaration (defined below). The Proponents believe that at least several of these ballots likely would have arrived before the voting deadline but for delays in their delivery that were outside of the sender’s control. The Proponents request that the Court permit all of these ballots to be counted pursuant to the Tabulation Rules approved by this Court and that any election indicated on such ballots be honored under the Plan.

1 numerous questions from Investors and other claimants and, through their conflicts counsel,  
2 communicated extensively with the Debtor's bank lenders to explain the details of the Plan and the  
3 voting process. Ultimately, all those lenders that cast a ballot voted in favor of the Plan.

4 Meanwhile, only one (limited) objection to the Plan (the "Limited Objection") was lodged  
5 and the Proponents have addressed the bases of that objection through revisions to the Plan that  
6 are discussed below. No other plan of reorganization or liquidation has been proposed in the  
7 Chapter 11 Cases.

8 The Plan provides built-in flexibility in order to achieve a value-maximizing result. In that  
9 regard, the Plan provides an option to place the Real Properties owned by the Debtors, either  
10 directly or indirectly, into an operating company called "OpCo" (short for Operating Company)  
11 which will, in turn, be owned by the PFI Trust, and managed by experts retained by the trustee of  
12 the PFI Trust.

13 A second option under the Plan contemplates the Debtors' selling the Real Properties prior  
14 to the Effective Date, in which case there will be no need for an OpCo (and consequently an OpCo  
15 will not be established) and the post-Effective Date corporate governance will be greatly  
16 simplified.

17 As it stands the Debtors intend to pursue a sale of all or a substantial portion of their Real  
18 Properties pursuant to proposed sale procedures that will soon be submitted to this Court for  
19 approval. As such, the Proponents do not presently anticipate that the PFI Trust will be  
20 overseeing the operation of a large number of the Real Properties as part of an OpCo structure  
21 once the Effective Date occurs.

22 Investors and other unsecured creditors of the Debtors will, in exchange for their allowed  
23 claims against any of the Debtors, become beneficiaries of the PFI Trust and will be entitled to  
24 distributions on their allowed claims as set forth in the Plan. Under either option (*i.e.*, an OpCo or  
25 a pre-Effective Date sale) a "Board of Advisors" (composed of investors in the Debtors) will have  
26 certain duties and rights as the PFI Trustee attempts to best monetize the PFI Trust's assets.

27 The Plan should be confirmed so that the PFI Trust (and, only in the unlikely event it is  
28 necessary, the OpCo) can be established and the reorganization of the Debtors' affairs can

1 commence. The Proponents request the Court to issue an order confirming the Plan in the form  
2 attached hereto as Exhibit B.

3 This Memorandum is supported by the concurrently filed Declaration of Andrew  
4 Hinkelman and Declaration of John Burlacu (the “Burlacu Declaration”), including the Final  
5 Tabulation Results attached as Exhibit A to the Burlacu Declaration (the “Final Tabulation  
6 Results”), as well as the facts, evidence, and pleadings of record in this case.

7 By this Memorandum, the Proponents respectfully request that the Court find that the Plan  
8 meets all of the requirements of the Bankruptcy Code and enter an order confirming the Plan over  
9 the Limited Objection.

## 10 II. FACTUAL BACKGROUND

11 Originally founded by Ken Casey (“Casey”), the Debtors comprise a group of related  
12 entities that directly or indirectly own, manage and/or otherwise control various real properties in  
13 California, including Marin and Sonoma Counties.<sup>4</sup> Although touted and marketed to Investors as  
14 a premier real estate investment and management firm, in fact, while the Real Properties do indeed  
15 exist, the business was nothing more than a Ponzi scheme. After Casey’s death in May 2020, new  
16 management was installed, and the Debtors’ prior fraudulent scheme was uncovered.

17 On July 16, 2020, certain creditors commenced an involuntary chapter 11 bankruptcy  
18 action against PISF, Case No. 20-30579 (the “PISF Case”) and this Court entered an order for  
19 relief in the PISF Case on July 27, 2020.

20 Also on July 26, 2020, PFI commenced its bankruptcy case by filing a voluntary chapter  
21 11 petition. On November 20, 2020, under authority granted by this Court, PFI commenced  
22 involuntary petitions against 29 of its limited liability company and limited partnership affiliates  
23 (collectively, the “November 2020 Debtors”). On December 11, 2020, this Court entered orders  
24 for relief against the November 2020 Debtors. Between February 3-4, 2021, PFI filed involuntary  
25 chapter 11 petitions against ten additional limited liability company affiliates (the “February 2021  
26 Debtors”), and this Court subsequently entered orders for relief against the February 2021 Debtors

27 <sup>4</sup> Overall, the Debtors own either direct or indirect interests in approximately seventy (70) real property locations  
28 (collectively, the “Real Properties”), primarily consisting of apartment buildings and office parks. A Schedule of  
the Real Properties is attached to the Disclosure Statement as Schedule 1.

1 on February 18, 2021. All of the Debtors' Chapter 11 Cases are jointly administered under Case  
2 No. 20-30604.

3       Following the revelation of the massive Ponzi scheme and the resulting bankruptcy filings,  
4 the Proponents, together with the Ad Hoc Committees, have worked diligently to maximize  
5 recoveries for the Debtors' Investors and other creditors. To this end, the Debtors and the  
6 Committees, through months of open cooperation, information gathering and negotiation for the  
7 benefit of all Investors, reached a global resolution, embodied in the Plan, aimed at: (i) mitigating  
8 the damage inflicted by Casey (and others) having operated the Debtors as a Ponzi scheme; and  
9 (ii) developing a level playing field that attempts to treat all aggrieved Investors equally and fairly.

10       To effectuate distributions to Investors and other creditors, the Plan provides for the  
11 creation of the PFI Trust, which will own the Estates' assets (including indirectly owning any Real  
12 Properties that remain in the Debtors' portfolio as of the Effective Date through the OpCo) and  
13 will sell or otherwise dispose of those assets to generate cash, and then distribute that (and other)  
14 cash to creditors (including to Investors). The PFI Trust also will own litigation claims against  
15 third parties that may generate cash through prosecution or settlement of those claims. Cash will  
16 be distributed by the PFI Trust to Investors and other creditors over time (as the PFI Trust collects  
17 on the PFI Trust Assets and/or the OpCo upstreams operating profits from and/or sale proceeds  
18 from the disposition of the Real Properties).

19       Critically, the Plan Proponents have ensured that Investors will continue to have an  
20 advisory role in connection with certain key decisions that will be made by the PFI Trust by  
21 creating the Board of Advisors (the "Board") to serve in connection with the PFI Trust. The  
22 proposed PFI Trustee (Michael Goldberg) has been jointly selected by the Committees and the  
23 Committees have also jointly selected the initial members of the Board.

24       In response to the Limited Objection,<sup>5</sup> the Plan changed the definition of "Investor" from  
25 what appeared in the First Amended Plan, to ensure that PFI LLC Members that also hold TIC  
26 Interests do not have their membership interests cancelled.

27  
28 <sup>5</sup> On May 13, 2021, Christina Hariclia Ensign, as Trustee of the Amended and Restated Christina Hariclia Ensign Trust dated August 15, 1996, and Felix Arts and Carol Sue Sproule, as Trustees of the Arts-Sproule Family Trust dated December 3, 2018 filed the Limited Objection to the First Amended Plan as Dkt. No. 636.

### III. ARGUMENT

Under the Bankruptcy Code, a plan “shall” be confirmed if all of the applicable confirmation requirements set forth in Bankruptcy Code Section 1129 are satisfied. *See Brady v. Andrew (In re Commercial Western Fin. Corp.)*, 761 F.2d 1329, 1338 (9th Cir. 1985). As discussed below, the Plan satisfies all of the applicable confirmation requirements of Section 1129 and should therefore be confirmed.

#### A. The Plan Complies With Bankruptcy Code Section 1129(a)(1).

Bankruptcy Code Section 1129(a)(1) requires that a plan comply with the “applicable provisions of this title.” *See* 11 U.S.C. § 1129(a)(1); *Resorts Int’l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995). “The legislative history of Subsection 1129(a)(1) suggests that Congress intended the phrase ‘applicable provisions’ in this Subsection to mean provisions of chapter 11 that concern the *form* and *content* of reorganization plans.” *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 648-49 (2d Cir. 1988) (emphasis added). The two applicable provisions relating to the form and content of a plan of reorganization are Bankruptcy Code Sections 1122 and 1123, which govern classification of claims and interests and the contents of a plan, respectively. *See In re Texaco Inc.*, 84 B.R. 893, 905 (Bankr. S.D.N.Y. 1988), *appeal dismissed* 92 B.R. 38 (S.D.N.Y. 1988) (“In determining whether a plan complies with Section 1129(a)(1), reference must be made to Code §§ 1122 and 1123 with respect to classification of claims and the contents of a plan of reorganization.”). As demonstrated below, the Plan complies with both Bankruptcy Code Sections 1122 and 1123, and thus satisfies the requirements of Subsection 1129(a)(1).

##### 1. The Plan Complies With The Classification Requirements Of Bankruptcy Code Section 1122.

Section 1122(a) of the Bankruptcy Code requires that each claim or interest within a class be substantially similar to all other claims or interests within that class. *See* 11 U.S.C. § 1122(a). Courts are afforded broad discretion to decide the propriety of classification in plans in light of the facts of each case. *See Steelcase Inc. v. Johnston (In re Johnston)*, 21 F.3d 323, 327 (9th Cir. 1994). A plan proponent is afforded significant flexibility in classifying claims under § 1122(a) provided there is a reasonable, non-discriminatory basis for the classification scheme and all

1 claims within a particular class are substantially similar. *In re Montclair Retail Ctr., L.P.*, 177  
2 B.R. 663, 665 (B.A.P. 9th Cir. 1995) (citing *In re Johnston, supra*); *In re Rexford Properties LLC*,  
3 558 B.R. 352, 361 (Bankr. C.D. Cal. 2016).

4 Here, the Plan's classification of Claims satisfies the requirements of Bankruptcy Code  
5 Section 1122. The Plan sets forth nine separate and distinct classes of claims and interests in the  
6 following classes:

7	Class 1	Non-Investor First-Priority Lender Claims	Class 6	TIC Claims
8	Class 2	Non-Investor Other Secured Claims	Class 7	Other Unsecured Claims
9	Class 3	Priority Claims	Class 8	Other Subordinated Claims
10	Class 4	DOT Noteholder Claims	Class 9	Equity Interests
11	Class 5	Non-DOT Investor Claims		

12  
13 The foregoing classification scheme is appropriate because the Plan adheres to the  
14 statutory requirements that the claims and interests within each class be substantially similar to all  
15 other claims and interests in that class. Pursuant to the Plan's classification scheme secured debt is  
16 classified separately from unsecured debt and each secured creditor position is placed in its own  
17 sub-class (thereby reflecting its unique collateral).

18 Class 1 consists of the Non-Investor First-Priority Lender Claims, which are impaired  
19 under the Plan. Each allowed Non-Investor First-Priority Lender Claim is deemed to be in its own  
20 subclass. On or as soon as is reasonably practicable after the Effective Date, each Holder of a  
21 Class 1 Claim will receive either: (i) in the event of a sale or refinance concerning the Collateral,  
22 cash in the Allowed Amount of such Holder's Class 1 Claim that shall be immediately paid from  
23 escrow in exchange for release of such Holder's Lien; or (ii) the return by the PFI Trust or OpCo,  
24 as applicable, and subject to mutual agreement or court order, by deed in lieu of foreclosure,  
25 surrender, or termination of any stay, of the Collateral securing such Class 1 Claim, without  
26 representation or warranty by any Person; or (iii) (A) reinstatement of the maturity of such Class 1  
27 Claim in the Allowed Amount as the maturity existed before any default, (B) payment of any  
28 taxes, contractual legal fees, cost and other charges, and past due installments of principal or

1 interest, and (C) continuation thereafter of payments of principal, interest and other obligations  
2 when and as the same come due. Treatment for the claims in Class 1 is different and distinct than  
3 the treatment provided for the other secured classes of claims.

4 Class 2 consists of the Non-Investor Other Secured Claims, and each such claim is treated  
5 as a separate sub-Class within Class 2. The claims in Class 2 are all unimpaired under the Plan.  
6 On or as soon as is reasonably practicable after the Effective Date, each Holder of an Allowed  
7 Class 2 Claim shall receive, at the PFI Trust's option: (i) Cash from the PFI Trust in the Allowed  
8 amount of such Holder's Allowed Class 2 Claim; or (ii) the return by the PFI Trust of the  
9 Collateral securing such Allowed Class 2 Claim, without representation or warranty by any Person  
10 (and without recourse against any Person regarding such Non-Investor Other Secured Claim); or  
11 (iii) (A) the cure of any default, other than a default of the kind specified in Bankruptcy Code  
12 section 365(b)(2), that Bankruptcy Code section 1124(2) requires to be cured, with respect to such  
13 Holder's Allowed Class 2 Claim, without recognition of any default rate of interest or similar  
14 penalty or charge, and upon such cure, no default shall exist; (B) the reinstatement of the maturity  
15 of such Allowed Class 2 Claim as the maturity existed before any default, without recognition of  
16 any default rate of interest or similar penalty or charge; and (C) retention of its unaltered legal,  
17 equitable, and contractual rights with respect to such Allowed Claim. Treatment for the claims in  
18 Class 2 is different and distinct than the treatment provided for the other secured classes of claims.

19 Class 3 consists of Priority Claims, which are unimpaired under the Plan. The Plan  
20 provides that each claimant in this Class shall receive full satisfaction for such claim by, or as  
21 soon as reasonably practicable after, the later of the Effective Date or the date such claim in this  
22 Class becomes Allowed. See 11 U.S.C. § 1129(a)(9)(A); see also In re Sullivan, 26 B.R. 677, 678  
23 (Bankr. W.D.N.Y. 1982) (holding that it is improper to classify general unsecured claims and  
24 priority claims together in the same class).

25 Class 4 consists of DOT Noteholder Claims, which are impaired under the Plan. For  
26 purposes of distributions under the Plan, Holders of DOT Noteholder Claims in Class 4 are  
27 considered to be in separate subclasses within Class 4 on a property by property basis (i.e., Class  
28 4A is composed of all DOT Noteholder Claims relating to Real Property A, Class 4B is composed

1 of all DOT Noteholder Claims relating to Real Property B, etc.), and each such subclass for each  
2 applicable Real Property is deemed to be a separate Class for purposes of the Plan.

3 Class 5 consists of the Non-DOT Investor Claims. These claims are impaired under the  
4 Plan and the claimants in Class 5 shall receive, in full satisfaction, settlement, and release of and in  
5 exchange for such Claims, (i) one (1) Class A PFI Trust Interest for each dollar of Allowed  
6 Investor Restitution Claims held by the applicable Investor and one (1) Class B PFI Trust Interest  
7 for each dollar of Allowed Investor Subordinated Claims, and (ii) the other consideration provided  
8 for in the Investor Claims Special Provisions. These claims are classified separately because they  
9 receive a different treatment under the Plan than the other classes comprised of unsecured claims.

10 Class 6 consists of the TIC Claims. Claims in Class 6 are impaired under the Plan and the  
11 claimants in Class 6 shall receive, in full satisfaction, settlement, and release of and in exchange  
12 for such Claims, one (1) Class A PFI Trust Interest for each dollar of Allowed TIC Claims held by  
13 the applicable Holder. Alternatively, if the Holder of a TIC Claim makes a valid TIC Investor  
14 Treatment Election, that Holder shall receive the treatment provided to Holders of Class 5 Non-  
15 DOT Investor Claims, with one important exception regarding creditor claim aggregation. Claims  
16 in Class 6 are classified separately from other types of Claims because they are receiving a  
17 different treatment under the Plan than other types of Claims.

18 Class 7 consists of the Other Unsecured Claims. These claims are impaired under the Plan  
19 and claimants in Class 7 shall receive, in full satisfaction, settlement, and release of and in  
20 exchange for such Claims, one (1) Class A PFI Trust Interest for each dollar of Allowed Other  
21 Unsecured Claims held by the applicable Holder. Class 7 Claims are classed separately because  
22 they receive different treatment under the Plan than other classes comprised of unsecured Claims.

23 Class 8 consists of Other Subordinated Claims. These claims are impaired under the Plan  
24 and retain only a residual right to receive Available Cash that remains in the PFI Trust after the  
25 final administration of all PFI Trust Assets and OpCo Assets, and the complete satisfaction of all  
26 senior payment rights within the PFI Trust Interests Waterfall, including satisfaction of all  
27 Investor Subordinated Claims.

1 Class 9 consists of Equity Interests and is impaired under the Plan. Subject to any  
2 Alternative Restructuring Transactions, Equity Interests will be deemed void, cancelled, and of no  
3 further force and effect as of the Effective Date. Holders of Equity Interests shall not be entitled  
4 to, and shall not receive or retain any property or interest in property on account of such interests.

5 As explained above, valid business, factual and legal reasons exist for the Plan's claim  
6 classification scheme. Based on their security position, if any, their legal priority against the  
7 Debtors' assets, and other relevant criteria, each of the stated Classes contains substantially similar  
8 Claims in terms of the legal or factual rights of the members within a particular Class.  
9 Accordingly, the Plan meets the requirements of Bankruptcy Code section 1122(a).

10 2. The Plan Contains All Mandatory Provisions And Certain Permissive Provisions  
11 Set Forth In Bankruptcy Code Section 1123.

12 Bankruptcy Code Section 1123(a) sets forth mandatory requirements for a plan, and  
13 Section 1123(b) identifies various permissive provisions that may be included in a plan, but which  
14 are not required. The Plan proposed in this case complies with both Section 1123(a) and (b).

15 a. *Compliance With Bankruptcy Code Section 1123(a)(1) (Classification of*  
16 *Claims).*

17 Bankruptcy Code Section 1123(a)(1) requires a plan to designate classes of claims and  
18 interests, other than claims of a kind specified in Bankruptcy Code Section 507(a)(2)  
19 (administrative expense claims, including Professional Fee Claims), Bankruptcy Code  
20 Section 507(a)(3) (claims arising during the "gap" period in an involuntary case), and Bankruptcy  
21 Code Section 507(a)(8) (priority tax claims). *See* 11 U.S.C. § 1123(a)(1); *see also In re Haardt*,  
22 65 B.R. 697, 700 (Bankr. E.D. Pa. 1986); *accord In re Commercial W. Fin. Corp.*, 761 F.2d 1329,  
23 1334 (9<sup>th</sup> Cir. 1985).

24 Section 1.1 of the Plan classifies the Claims and Equity Interests into nine separate  
25 Classes. The Plan does not classify administrative claims, including professional fee claims,  
26 involuntary gap claims or priority tax claims. Thus, the Plan satisfies the requirements of  
27 Bankruptcy Code Section 1123(a)(1).

28 b. *Compliance With Bankruptcy Code Section 1123(a)(2) (Specification of*  
*Unimpaired Classes and Interests).*

1 Bankruptcy Code Section 1123(a)(2) requires that a plan “specify any class of claims or  
2 interests that is not impaired under the plan.” 11 U.S.C. § 1123(a)(2); *see also In re Smith*, 123  
3 B.R. 863, 865 (Bankr. C.D. Cal. 1991).

4 Section 1.1 of the Plan sets forth the two classes whose rights are unimpaired by the Plan –  
5 Class 2 (Non-Investor Other Secured Claims) and Class 3 (Priority Claims). The Plan thus  
6 satisfies Bankruptcy Code Section 1123(a)(2).

7 *c. Compliance With Bankruptcy Code Section 1123(a)(3) (Specification of*  
8 *Treatment of Impaired Classes and Interests).*

8 Bankruptcy Code Section 1123(a)(3) requires that a plan “specify the treatment of any  
9 class of claims or interests that is impaired under the plan.” 11 U.S.C. § 1123(a)(3). In  
10 accordance with Bankruptcy Code Section 1123(a)(3), Sections 2.2, 2.5, 2.6, 2.7, 2.8, 2.9, and  
11 2.10 of the Plan specify the treatment of Classes 1, 4, 5, 6, 7, 8, and 9, respectively, all of which  
12 are impaired under the Plan.

13 *d. Compliance With Bankruptcy Code Section 1123(a)(4) (Provide Same*  
14 *Treatment For Each Claim or Interest Within a Class).*

14 Bankruptcy Code Section 1123(a)(4) requires that a plan “provide the same treatment for  
15 each claim or interest of a particular class, unless the holder of a particular claim or interest agrees  
16 to a less favorable treatment of such particular claim or interest.” 11 U.S.C. § 1123(a)(4). As set  
17 forth in Sections 2.2 – 2.10 of the Plan, each claim or interest in each of the classes set forth in the  
18 Plan will receive the same treatment as every other claim or interest in such class.

19 *e. Compliance With Bankruptcy Code Section 1123(a)(5) (Adequate Means*  
20 *for Implementation of Plan).*

20 Bankruptcy Code Section 1123(a)(5) requires that a plan “provide adequate means for the  
21 plan's implementation” and sets forth several examples of such adequate means. 11 U.S.C.  
22 § 1123(a)(5).

23 The means for implementing the Plan are set forth throughout the Plan, but are primarily  
24 described in Article IV of the Plan. On the Effective Date, among other things, Michael Goldberg  
25 will become the PFI Trustee, the PFI Trust will be established and automatically vested with the  
26 PFI Trust Assets, the Board will begin to serve its advisory function, the OpCo Assets (if any)  
27 shall be assigned or otherwise transferred or conveyed to the OpCo, and PFI, PISF, the LLC/LP  
28 Debtors, Professional Investors 28, LLC, and PFI Glenwood LLC shall be substantively

1 consolidated. The PFI Trust will then begin pursuing, collecting from, and/or monetizing the PFI  
2 Trust Assets and the OpCo Assets and making Distributions from the proceeds of such assets to  
3 the PFI Trust Beneficiaries.

4 *f. Compliance With Bankruptcy Code Section 1123(a)(6) (Amendment to*  
5 *Corporate Charter).*

6 Section 1123(a)(6) requires a reorganizing debtor to amend its corporate charter to prohibit  
7 the issuance of nonvoting securities. As set forth in Section 4.2.3 of the Plan, on the Effective  
8 Date each of the Debtors will be dissolved automatically. Moreover, the Debtors' property assets  
9 are expected to be sold within the next several months (and prior to the Effective Date). As such,  
10 the requirement of Section 1123(a)(6) should not be applicable in this situation.

11 *g. Compliance With Bankruptcy Code Section 1123(a)(7) (Selection of*  
12 *Trustee).*

13 Bankruptcy Code Section 1123(a)(7) requires that a plan:

14 contain only provisions that are consistent with the interests of  
15 creditors and equity security holders and with public policy with  
16 respect to the manner of selection of any officer, director, or trustee  
17 under the plan and any successor to such officer, director, or trustee.

18 11 U.S.C. § 1123(a)(7). The Plan proposes that Michael Goldberg serve as the Initial PFI Trustee.  
19 Mr. Goldberg was jointly selected by the Committees as the Initial PFI Trustee. He has served as  
20 the court-approved sole director of Professional Financial Investors, Inc. and Professional  
21 Investors Security Fund, Inc. since August 11, 2020. Mr. Goldberg chairs Akerman LLP's Fraud  
22 and Recovery Practice, an experienced team of lawyers focused on unraveling high-profile  
23 investor fraud, including Ponzi schemes. He has wide-ranging experience as a counsel, receiver or  
24 other senior official in cases involving fraud. As such, Mr. Goldberg's appointment as the Initial  
25 PFI Trustee satisfies the requirements of section 1123(a)(7).

26 As set forth in Section 8.4 of the PFI Trust Agreement, upon the resignation, death,  
27 incapacity, or removal of a PFI Trustee, and after an affirmative vote of 2/3s of the members of the  
28 Board of Advisors at a Non-Emergency Meeting, the Board of Advisors shall appoint a successor  
PFI Trustee to fill the vacancy so created, subject to the approval of this Court so long as any of  
the Chapter 11 Cases are pending. As such, the Plan's provisions regarding the appointment of  
any successor PFI Trustee satisfy the requirements of section 1123(a)(7).

1                   h.       *Section 1123(a)(8) Does Not Apply.*

2           Bankruptcy Code Section 1123(a)(8) contains requirements applicable to individual debtor  
3 cases which do not apply to this corporate debtor.

4                   i.       *Compliance With Bankruptcy Code Section 1123(b) (Permissive Plan Provisions).*

5           Bankruptcy Code Section 1123(b) describes various other provisions that are permitted in  
6 a plan. The Plan contains a number of these provisions, all of which are intended to facilitate the  
7 reorganization of the Debtors and payment to creditors. These include the following:

- 8           • In Article 1, the Plan treats the (i) Non-Investor First-Priority Lender Claims (Class 1), (ii) DOT Noteholder Claims (Class 4), (iii) Non-DOT Investor Claims (Class 5),  
9 (iv) TIC Claims, (Class 6), (v) Other Unsecured Claims (Class 7), (vi) Other Subordinated Claims (Class 8), and (vii) Equity Interests (Class 9) as impaired, but  
10 leaves the (i) Non-Investor Other Secured Claims (Class 2) and (ii) Priority Claims (Class 3) unimpaired, all as permitted by Section 1123(b)(1).
- 11           • In Article V, the Plan assumes all executory contracts and unexpired leases that are listed on the Schedule of Assumed Agreements assigns such contracts and leases to  
12 the PFI Trust or the OpCo, as appropriate, as permitted by Section 1123(b)(2) of the Bankruptcy Code.
- 13           • In Section 10.10, the Plan provides that (i) from and after the Effective Date, the PFI Trust may compromise and settle certain disputes about any Claims or about  
14 any PFI Trust Actions, without any further approval by this Court, subject to the terms and conditions of the PFI Trust Agreement and (ii) until the Effective Date,  
15 the Debtors expressly reserve the right to compromise and settle (subject to the approval of this Court) any Avoidance Actions and Causes of Action belonging to  
16 the Estates, as permitted by Section 1123(b)(3) of the Bankruptcy Code.
- 17           • Section 4.3.5(g) of the Plan provides that, under the conditions set forth therein, the PFI Trustee shall have the authority and right on behalf of the PFI Trust, without  
18 the need for this Court's approval, to, among other things, sell, monetize, assign or otherwise dispose of the PFI Trust Assets or the OpCo Assets (including, without  
19 limitation, any Real Properties) or any part thereof or interest therein upon such terms as the PFI Trustee determines to be necessary, appropriate, or desirable,  
20 subject to the provisions of the PFI Trust Agreement, as permitted by Section 1123(b)(4) of the Bankruptcy Code.
- 21           • Bankruptcy Code section 1123(b)(5) provides that a plan may "modify the rights of holders of secured claims . . . or of holders of unsecured claims, or leave unaffected  
22 the rights of holders of any class of claims." 11 U.S.C. § 1123(b)(5). As set forth in Article II of the Plan, the Plan modifies the rights of the holders of allowed  
23 Claims and Interests in Classes 1, 4, 5, 6, 7, 8, and 9. The Plan leaves unaffected the rights of the holders of allowed Claims in Class 2 and Class 3. Pursuant to the  
24 Plan, interests of PFI LLC Members in the PFI-Managed LLC and LP Interest Holders are automatically recharacterized as Class 5 Non-DOT Investor Claims  
25 (and are not treated as Equity Interests). This is permissible as this Court has entered an Order approving a stipulation that the Debtors were part of a "Ponzi  
26 scheme, *see* Dkt. No. 640, and limited partners or LLC members that invest in such a scheme actually receive restitution claims when they purchase their fraudulent LP  
27  
28

or LLC interest. *See Barclay v. Mackenzie (In re AFI Holding, Inc.)*, 525 E3d 700, 708-09 (9th Cir. 2008).<sup>6</sup>

**B. The Plan Proponents Have Complied With The Requirements Of Bankruptcy Code Section 1129(a)(2) (Compliance With Applicable Provisions of Title 11).**

Bankruptcy Code Section 1129(a)(2) requires that the proponent of the plan also comply with “the applicable provisions” of title 11. 11 U.S.C. § 1129(a)(2). The “applicable provisions” of title 11 are Bankruptcy Code Section 1121 (dealing with who may file a plan) and Bankruptcy Code Section 1125 (dealing with the solicitation of acceptances of a plan). *See In re Hoff*, 54 B.R. 746, 750-51 (Bankr. D.N.D. 1985); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984).

**1. Compliance With Bankruptcy Code Section 1121(a) (Who May File a Plan).**

Bankruptcy Code section 1121 allows a debtor to propose a plan at any time in a voluntary bankruptcy case or an involuntary bankruptcy case. Bankruptcy Code section 1121 also allows a creditor under certain circumstances to propose a plan. Here, the Proponents of the Plan are the Debtors and the OCUC. Thus the proposal of the Plan complies with Section 1121(c).

**2. Compliance With Bankruptcy Code Section 1125 (Post-petition Disclosure and Solicitation).**

One of the principal purposes of Bankruptcy Code Section 1129(a)(2) is to ensure that plan proponents have complied with the requirements of Bankruptcy Code Section 1125 in the solicitation of acceptances of a plan of reorganization. *See, e.g., In re Jeppson*, 66 B.R. 269, 296-97 (Bankr. D. Utah 1986). Bankruptcy Code Section 1125(b) provides that a proponent may not solicit acceptances of its plan unless, at or before the time of such solicitation, there is transmitted to the claimant, or the authorized representative thereof, the plan or a summary of the plan and a court-approved disclosure statement.

The Plan Proponents have fully complied with the mandates of Section 1125. Pursuant to the Solicitation Procedures Order, the Court, among other things, (i) conditionally approved the Disclosure Statement as containing adequate information within the meaning of Section 1125, (ii) approved the Proponents’ Plan Summary, among other items, as part of the solicitation package to

<sup>6</sup> The fact that the PFI LLC Members and the LP Interest Holders actually have restitution claims means that including the PFI LLC Members and LP Interest Holders’ claims in Class 5 does not raise an absolute priority issue as such claims are not actually junior to Class 5.

1 be distributed for the solicitation of votes to accept or reject the Plan (the “Solicitation Package”),  
2 and (iii) authorized the Proponents to post the Plan and Disclosure Statement on Donlin Recano’s  
3 PFI website in a dedicated location, with instructions provided in the Solicitation Package for  
4 accessing them, rather than including a hard copy of each in the Solicitation Package.  
5 Subsequently, in compliance with Bankruptcy Rule 3017(d), between April 22-23, 2021, the Plan  
6 Proponents transmitted the Solicitation Package to creditors and equity holders entitled to vote on  
7 the Plan. The certificate of service regarding the distribution of the solicitation package has been  
8 filed with this Court as Docket No. 608. The Solicitation Package provided notice of the  
9 deadlines to (i) submit a ballot on the Plan and (ii) object to confirmation of the Plan.

10 The Plan Proponents have complied with the applicable provisions of the Bankruptcy  
11 Code, the Bankruptcy Rules and the solicitation procedures approved by this Court, and thus the  
12 Plan complies with the requirements of Bankruptcy Code Section 1129(a)(2).

13 **C. The Plan Satisfies the Other Consensual Plan Requirements of Section 1129(a), with**  
14 **the Exception of Section 1129(a)(8) as to Certain Subclasses of Class 1.**

15 1. The Plan Has Been Proposed In Good Faith In Compliance With Bankruptcy Code  
16 Section 1129(a)(3).

17 Bankruptcy Code Section 1129(a)(3) requires a plan to be “proposed in good faith and not  
18 by any means forbidden by law.” 11 U.S.C. § 1129(a)(3). Good faith for purposes of Section  
19 1129(a)(3) of the Bankruptcy Code also may be found where the plan is supported by key creditor  
20 constituencies, or was the result of extensive arm’s-length negotiations with creditors. *In re*  
21 *Eagle-Picher Indus., Inc.*, 203 B.R. 256, 274 (Bankr. S.D. Ohio 1996).

22 From the facts and the circumstances of this case, it is evident that the Plan Proponents  
23 have proposed the Plan in good faith. Here, the Plan is the result of extensive negotiations  
24 between the Debtors and the Committees. The Plan was jointly prepared and submitted by the  
25 Debtors and the OCUC and is supported by the Ad Hoc Committees. Because the Plan was  
26 heavily negotiated and reflects the input of key creditor constituencies, nearly 99.8% of voting  
27 creditors accepted the Plan. For these reasons, it is clear the Plan was proposed in good faith  
28 under Bankruptcy Code section 1129(a)(3).

1           2.     The Plan Complies With The Requirements Of Bankruptcy Code  
2                 Section 1129(a)(4) (Payment for Services or Costs in Connection With the Case).  
3     Bankruptcy Code Section 1129(a)(4) requires payments to estate professionals to be  
4     approved by this Court or subject to this Court’s approval. Section 10.3 of the Plan provides that  
5     all final requests for payment of Professional Fee Claims “must be made by application Filed with  
6     the Bankruptcy Court.” Thus the Plan complies with Section 1129(a)(4).

7           3.     The Plan Complies With Bankruptcy Code Section 1129(a)(5) Regarding the  
8                 Identity and Affiliations of Officers, Directors, and Insiders.  
9     Pursuant to Bankruptcy Code Section 1129(a)(5)(A)(i), a proponent of a plan must disclose  
10    the identity and affiliations of the debtor’s post-confirmation management. Exhibit B to the Plan  
11    Supplement discloses the identity and affiliations of the PFI Trustee as well as each of the  
12    members of the Board. Section 1129(a)(5) is thus satisfied.

13           4.     The Plan Complies With Bankruptcy Code Section 1129(a)(6) Regarding  
14                 Governmental Regulatory Approval of Rates.  
15    Section 1129(a)(6) requires that any regulatory commission with jurisdiction over the rates  
16    of the debtor approve any changes in rates provided in the plan. *See* 11 U.S.C. § 1129(a)(6). This  
17    is not applicable here; no such regulatory commission exists.

18           5.     The Plan Satisfies the Requirements Of Bankruptcy Code Section 1129(a)(7)  
19                 (“Best Interests” Test).  
20    The “best interests” test set forth in Section 1129(a)(7) requires that the plan proponent  
21    demonstrate that:

22                   with respect to each impaired class of claims or interests –

23                   (A) each holder of a claim or interest of such class –

24                   (i) has accepted the plan, or

25                   (ii) will receive or retain under the plan on account of such claim or  
26                   interest property of a value, as of the effective date of the plan, that  
27                   is not less than the amount that such holder would so receive or  
28                   retain if the debtor were liquidated under chapter 7 of this title on  
                      such date . . . .

11 U.S.C. § 1128(a)(7). The “best interests” test focuses on individual dissenting creditors rather  
than classes of claims. *See, In re Drexel Burnham Lambert Group*, 138 B.R. 723, 761 (Bankr.  
S.D.N.Y. 1992). On its face, Section 1129(a)(7) only applies to impaired and classified claims or  
interests. It does not, therefore, apply to unimpaired or unclassified claims.

1 In this case, more than ninety-nine percent (99%) of impaired claimants that voted  
2 accepted the Plan, satisfying the best interests test under subpart (A)(i) above. However, some  
3 claimants in Class 4 and Class 5 voted to reject the Plan and a number of impaired claimants that  
4 were entitled to vote did not do so and are thus deemed to have rejected the Plan. For the  
5 claimants that either voted to reject the Plan or are deemed to have rejected the Plan, the best  
6 interests test needs to be satisfied under subpart (A)(ii) above.

7 Here, the liquidation analysis is simple and set forth in Exhibit C to the Disclosure  
8 Statement [Docket No. 572]. The Plan assumes both the ultimate sale of the Real Properties and  
9 pursuit of the Avoidance Actions, Causes of Action and Contributed Claims. Using two different  
10 sets of assumptions regarding the success and expense of the foregoing, the Plan Proponents  
11 believe that the Plan will provide holders of Allowed Class 4 and 5 Investor Restitution Claims<sup>7</sup>  
12 (which, for investors, will be their claim remaining after “netting”), Allowed Class 6 TIC Claims,  
13 and Allowed Class 7 Other Unsecured Claims with aggregate dividends over a period of years  
14 totaling 35% for the low estimate and 50% for the high estimate.<sup>8</sup>

15 In contrast, the Proponents believe that the dividends realized in a Chapter 7 liquidation  
16 would be substantially lower – primarily because of (a) the potentially accelerated pace of sales of  
17 the Real Properties likely to occur in a Chapter 7 liquidation; and (b) the statutory fee due to the  
18 Chapter 7 trustee for services in liquidating the assets. In addition, Conversion to chapter 7 of the  
19 Bankruptcy Code would mean the establishment of a new claims bar date, which could result in  
20 new Claims being asserted against the Estates, thereby diluting the recoveries of other Holders of  
21 Allowed Claims. Significantly, the benefits of the Investor Claims Special Provisions, the terms  
22 of which are substantially incorporated into the Plan, are available only under the Plan. The Plan  
23 embodies a comprehensive, extensively negotiated settlement and compromise of myriad novel  
24 and complex legal and factual issues relating to the Investors of the Debtors. In the event of

25  
26 <sup>7</sup> To the extent that any Class 5 claimants whose Claims are based on their status as a PFI LLC Member or as an LP  
Interest Holder either voted to reject the Plan or are deemed to have rejected the Plan, such claimants have an  
Investor Restitution Claim. See *In re AFI Holding, Inc.*, 525 E3d 708-09.

27 <sup>8</sup> The foregoing estimates do not take into account the potential effect of capital gains taxes that would be due upon  
28 sale of the Real Properties by the PFI Trust, as the Plan Proponents’ examination of that subject is ongoing (and  
as yet incomplete). Such taxes would reduce the foregoing projected percentage dividends.

1 conversion, the Chapter 7 trustee, Investors, and other creditors would have to confront the pursuit  
2 of extensive litigation to resolve these and other issues, or would need to try to negotiate an  
3 alternative settlement, all without the benefit of committee representation for creditors. This  
4 process would be extremely time-consuming and costly, and would very likely reduce and delay  
5 any recoveries available for creditors of the Estates. Accordingly, in a Chapter 7 liquidation, the  
6 Proponents believe general unsecured creditors would receive substantially less over time: 25%  
7 estimated low case and 35% estimated high case.

8 Another advantage of the Plan over a Chapter 7 liquidation is the likely ability of LLC and  
9 LP investors to avoid paying pass-through capital gains taxes when the Real Properties are sold.  
10 Such taxes are generally not expected to pass through to LLC and LP investors under the Plan.  
11 Accordingly, the Proponents believe the Plan is likely to produce an outcome significantly better  
12 than what could be expected in a Chapter 7 liquidation. Section 1129(a)(7) is therefore satisfied.

13 6. Each Class of Claims and Interests has Accepted the Plan, is Unimpaired, or May  
14 be Crammed Down – Sections 1129(a)(8) and 1129(b).

15 Bankruptcy Code Section 1129(a)(8) requires that each class of claims and interests has  
16 either accepted the plan or is not impaired under the plan. *See* 11 U.S.C. § 1129(a)(8). A class of  
17 claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in  
18 number of claims of that class vote to accept the plan, counting only those claims whose holders  
19 actually vote on the plan. *See* 11 U.S.C. § 1126(c). If a class of creditors or interests holders does  
20 not accept the Plan, then section 1129(b) of the Bankruptcy Code provides that a plan may be  
21 confirmed if it does not discriminate unfairly and is fair and equitable with respect to each class  
22 that is impaired under the plan and has not accepted the Plan. *See* 11 U.S.C. § 1129(b).

23 The following analysis demonstrates that each Class has accepted the Plan, is not impaired  
24 or satisfies the requirements for cram down confirmation:

25 Class 1 (Non-Investor First-Priority Lender Claims): Class 1 is impaired and entitled to  
26 vote. As set forth in the Final Tabulation Results, each subclass of Class 1 that voted submitted a  
27 ballot accepting the Plan. No subclass of Class 1 voted to reject the Plan, but twelve of the twenty  
28 subclasses in Class 1 did not submit (or did not timely submit) a ballot as shown in Exhibit A to  
the Burlacu Declaration. To the extent any subclass of Class 1 cannot be deemed to accept, the

1 Plan can nevertheless be confirmed with respect to any such subclass(es) because it satisfies the  
2 requirements of section 1129(b)(1).

3 Under the Plan, no other Class is set to receive more favorable treatment than Class 1. In  
4 addition, the Holders of all Class 1 Claims are substantially oversecured, based on the mortgage  
5 balance for each of the Real Properties and the broker's opinion of value for each of the Real  
6 Properties obtained by the Debtors prior to the bankruptcy cases [See Dkt. Nos. 296 and 414].  
7 The Plan, therefore, does not unfairly discriminate against Class 1.

8 The Plan also satisfies the condition that it be fair and equitable with respect to secured  
9 claims, as such condition is set forth in 11 U.S.C. § 1129(b)(2)(A). Under the Plan, the Liens of  
10 the Holders of Class 1 Claims will continue to attach to their respective Collateral and all Class 1  
11 claimants shall, on or as soon as is reasonably practicable after the Effective Date, receive either:  
12 (i) in the event of a sale or refinance concerning the Collateral, cash in the Allowed Amount of  
13 such Holder's Class 1 Claim immediately paid from escrow, (ii) the return, by deed in lieu of  
14 foreclosure, surrender, or termination of any stay, of the Collateral securing such Class 1 Claim, or  
15 (iii) past due installments of principal or interest and the continuation thereafter of payments of  
16 principal, interest, and other applicable obligations, all as more fully set forth in the Plan.

17 Class 2 (Non-Investor Other Secured Claims) and Class 3 (Priority Claims): Class 2 and  
18 Class 3 are unimpaired and each is thus conclusively presumed to have accepted the Plan. See 11  
19 U.S.C. § 1126(f).

20 Class 4 (DOT Noteholder Claims):

21 Class 4 is impaired and entitled to vote. As set forth in the Final Tabulation Results, each  
22 subclass of Class 4 that voted, submitted a ballot accepting the Plan. As set forth in Exhibit A to  
23 the Burlacu Declaration, the following thirteen subclasses of Class 4, however, did not submit (or  
24 did not timely submit) a ballot: 4A6, 4A8, 4A12, 4A14-4A19, 4A22, 4A32, 4B2, and 4B25. To  
25 the extent any subclass of Class 4 cannot be deemed to accept, the Plan can nevertheless be  
26 confirmed with respect to any such subclass(es) because it satisfies the requirements of section  
27 1129(b)(1). No one has alleged that the Plan discriminates unfairly against Class 4 claims (or any  
28 other claims) and the fact that of the 806 Class 4 ballots that were cast, only two voted to reject the

1 Plan clearly shows that Class 4 claimants do not feel they are the subject of such discrimination.<sup>9</sup>  
2 The Plan also treats Class 4 claimants fairly and equitably. For those Class 4 claimants that have  
3 not released their Lien, the Plan provides a means for their Lien to be preserved if such claimants  
4 take the steps to do so set forth in the Plan. For those 762 Class 4 claimants that have released  
5 their Lien, their claims are treated *pari passu* with the other classes of unsecured claims.

6 Class 5 (Non-DOT Investor Claims): Class 5 is impaired and entitled to vote. As set forth  
7 in the Final Tabulation Results, Class 5 voted to accept the Plan pursuant to 11 U.S.C. § 1126(c).

8 Class 6 (TIC Claims): Class 6 is impaired and entitled to vote. As set forth in the Final  
9 Tabulation Results, Class 6 voted to accept the Plan pursuant to 11 U.S.C. § 1126(c).

10 Class 7 (Other Unsecured Claims): Class 7 is impaired and entitled to vote. As set forth in  
11 the Final Tabulation Results, Class 7 voted to accept the Plan. As such, Class 7 has accepted the  
12 Plan pursuant to 11 U.S.C. § 1126(c).

13 Class 8 (Subordinated Claims): Class 8 is impaired and deemed to reject the Plan. The  
14 Plan can nevertheless be confirmed because it satisfies the requirements of section 1129(b)(1) with  
15 respect to Class 8. The Plan does not unfairly discriminate against Class 8 claimants because there  
16 is no class of the same priority that receives better treatment under the Plan. Moreover, under the  
17 Plan, (i) the Holders of Allowed Class 8 Claims retain a residual right to receive Available Cash  
18 that remains in the PFI Trust after the final administration of all PFI Trust Assets and OpCo  
19 Assets, and the complete satisfaction of all senior payment rights within the PFI Trust Interests  
20 Waterfall, including satisfaction of all Investor Subordinated Claims and (ii) the only Class that is  
21 junior to Class 8 under the Plan (Class 9 Equity Interests), receives nothing and all Equity Interests  
22 are deemed void, cancelled, and of no further force and effect. As such, the Plan is fair and  
23 equitable with respect to Class 8 Claims under the terms of 11 U.S.C. § 1129(b)(2)(B).

24 Class 9 (Equity Interests): Class 9 is impaired and deemed to reject the Plan. The Plan can  
25 nevertheless be confirmed because it satisfies the requirements of section 1129(b)(1) with respect  
26 to Class 9. The Plan does not unfairly discriminate against Class 9 claimants because there is no  
27 other class of interests that receives better treatment under the Plan. Moreover, there is no class

28 <sup>9</sup> Of the timely Class 4 ballots received 797 voted to accept the Plan, 2 voted to reject, and 9 abstained.

1 junior to Class 9 under the Plan and, as such, the Plan is fair and equitable with respect to Class 9  
2 Claims under the terms of 11 U.S.C. § 1129(b)(2)(C).

3 7. The Plan Complies With Bankruptcy Code Section 1129(a)(9).

4 Bankruptcy Code Section 1129(a)(9) provides generally that (i) administrative claims and  
5 involuntary gap claims must be paid in full on the effective date of a plan, and (ii) priority tax  
6 claims may be paid in full on the effective date of the plan or in installments over a period not  
7 greater than five years. *See* 11 U.S.C. § 1129(a)(9).

8 The Plan satisfies the requirements of Section 1129(a)(9). Sections 2.1.1 and 2.1.3 of the  
9 Plan provide that administrative claims and involuntary gap claims are to be paid in full on the  
10 Effective Date. Meanwhile, Section 2.1.4 provides that priority tax claims shall be paid either on  
11 the Effective Date or in regular installments over a period not exceeding five years.

12 8. The Plan Has Been Accepted By At Least One Impaired Class in Compliance With  
13 Bankruptcy Code Section 1129(a)(10).

14 Bankruptcy Code Section 1129(a)(10) requires at least one class of impaired claims to  
15 have accepted the Plan, determined without including any acceptance of the Plan by an insider  
16 holding a claim in such class. *See* 11 U.S.C. § 1129(a)(10). Once a single impaired class accepts  
17 a plan, section 1129(a)(10) is satisfied as to the entire plan, even in jointly-administered cases  
18 involving a plan covering multiple debtors. *JPMCC 2007-C1 Grasslawn Lodging, LLC v.*  
19 *Transwest Resort Props. (In re Transwest Resort Props.)*, 881 F.3d 724, 729 (9th Cir. 2018). As  
20 discussed above and as set forth in the Final Tabulation Results, Classes 5, 6, and 7 are all  
21 impaired and have accepted the Plan. In addition, Classes 1 and 4 are impaired and all subclasses  
22 in Classes 1 and 4 that voted have voted to accept the Plan. Section 1129(a)(10) is thus satisfied.

23 9. The Plan is Feasible and in Compliance with Bankruptcy Code  
24 Section 1129(a)(11).

25 Bankruptcy Code Section 1129(a)(11) requires that “[c]onfirmation of the plan is not likely  
26 to be followed by the liquidation, or need for further financial reorganization, of the debtor or any  
27 successor to the debtor under the plan, unless such liquidation is proposed in the plan.” 11 U.S.C.  
28 § 1129(a)(11). This is sometimes referred to as the “feasibility test,” and requires the Court to  
determine whether the Plan is workable and has a reasonable likelihood of success. *See In re*  
*Patrician St. Joseph Partners*, 169 B.R. 669, 674 (Bankr. D. Ariz. 1994). Feasibility does not, nor

1 can it, require the certainty that a reorganized company will succeed. *See, e.g., United States v.*  
2 *Energy Resources Co.*, 495 U.S. 545, 549 (1990); *In re WCI Cable, Inc.*, 282 B.R. 457, 486  
3 (Bankr. D. Or. 2002) (“Guaranteed success in the stiff winds of commerce without the protection  
4 of the Code is not the standard under § 1129(a)(11).”). The feasibility standard merely requires  
5 the Court to determine whether a plan is workable and has a reasonable likelihood (*i.e.*, more  
6 likely than not) of success. *In re Acequia, Inc.*, 787 F.2d 1352, 1364 (9th Cir. 1986).

7 Here, the Plan is feasible because it does not make pie in the sky promises, but instead only  
8 provides for payment to creditors from the Available Cash and any additional proceeds from the  
9 PFI Trust Assets with a projected potential dividend in excess of 30 cents on the dollar. Thus,  
10 confirmation of the Plan is not likely to be followed by the need for further reorganization.

11 10. The Debtor Will Pay on or Before the Effective Date All Fees Payable Under 28  
12 U.S.C. § 1930 in Compliance With Bankruptcy Code Section 1129(a)(12).

13 Bankruptcy Code Section 1129(a)(12) requires the payment of “[a]ll fees payable under  
14 Section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on  
15 confirmation of the plan.” 11 U.S.C. § 1129(a)(12). The Plan complies with Section 1129(a)(12)  
16 by providing in Section 10.4 that all U.S. Trustee fees payable pursuant to 28 U.S.C. Section 1930  
shall be paid in full on or before the Effective Date.

17 11. Section 1129(a)(13) Regarding Retiree Benefits Does Not Apply.

18 Bankruptcy Code Section 1129(a)(13) requires a corporate debtor with a retirement plan to  
19 continue funding retiree benefits. This does not apply in this case, where the Debtors did not have  
20 a retirement plan pre-petition.

21 12. Section 1129(a)(14) Regarding Domestic Support Obligations Does Not Apply.

22 Bankruptcy Code Section 1129(a)(14) sets forth certain requirements with respect to the  
23 payment of domestic support obligations by individual debtors. This does not apply here as the  
24 Debtors are corporations, limited liability companies or limited partnerships.

25 13. Section 1129(a)(15) Does Not Apply.

26 Bankruptcy Code Section 1129(a)(15) sets forth certain requirements with respect to the  
27 distributions to unsecured claimants in the event that a holder of an allowed unsecured claim  
28

objects to the plan in an individual case. This section does not apply as the Debtors are corporations, limited liability companies or limited partnerships.

14. The Plan Complies With Bankruptcy Code Section 1129(d) Because The Principal Purpose Of The Plan Is Not To Avoid Taxes Or Applicable Securities Laws.

Bankruptcy Code Section 1129(d) provides:

Notwithstanding any other provision of this Section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of Section 5 of the Securities Act of 1933 (15 U.S.C. § 77e).

11 U.S.C. § 1129(d). Here, the principal purpose of the Plan is not to avoid taxes or the securities laws. No governmental party in interest has requested the denial of confirmation on any of the foregoing grounds (or indeed on any grounds). Accordingly, the Plan satisfies Section 1129(d).

**D. Substantive Consolidation is Appropriate and Necessary to the Plan**

The Plan provides for substantive consolidation of the Debtors' and their non-debtor affiliates' assets and liabilities for the purposes of distributions under the Plan. To help accomplish this, on April 29, 2021, the Debtors filed their *Motion for Order of Substantive Consolidation of Non-Debtor Affiliates Professional Investors 28, LLC and PFI Glenwood, LLC with Debtors* (the "Subcon Motion"), which motion seeks to substantively consolidate LLC 28 and PFI Glenwood with the Debtors' bankruptcy estate pursuant to the terms set forth in the Plan. No objection to the Subcon Motion was filed prior to the May 13, 2021 deadline to do so.

Here, substantive consolidation of the Debtors with each other and of the Debtors with LLC 28 and PFI Glenwood is clearly warranted. The primary purpose of substantive consolidation "is to ensure the equitable treatment of all creditors." *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 764 (9th Cir. 2000). Courts have permitted the consolidation of non-debtor and debtor entities in furtherance of the equitable goals of substantive consolidation. *Id.* at 765. Two broad themes have emerged from substantive consolidation case law: in ordering substantive consolidation, courts must (1) consider whether there is a disregard of corporate formalities and commingling of assets by various entities; and (2) balance the benefits that substantive consolidation would bring against the harms that it would cause. *Id.*

1 Although creditors generally may not have treated all of the Debtors and their non-debtor  
2 affiliates as one legal entity, there is very substantial scrambling and commingling of assets and  
3 liabilities between and among the Debtors themselves and between and among the Debtors and the  
4 two non-debtor affiliates – Professional Investors 28, LLC (“LLC 28”) and PFI Glenwood LLC  
5 (“PFI Glenwood”). As more fully described in the *Declaration of David Alfaro* filed on April 29,  
6 2021 as Dkt. No. 595 (the “Alfaro Declaration”), (i) funds were transferred to-and-from based on  
7 cash needs across the overall PFI Enterprise (as defined in the Alfaro Declaration, which  
8 definition encompasses LLC 28 and PFI Glenwood) and every individual property within the PFI  
9 Enterprise periodically received transfers to its bank accounts from PFI/PISF bank accounts and  
10 periodically transferred cash to PFI/PISF bank accounts, (ii) the organizational structure and  
11 movements of cash within the PFI Enterprise involved pervasive transfers of cash between and  
12 across the property specific entity bank accounts and the PFI/PISF corporate bank accounts—  
13 rendering the segregation of each investor’s dollars impossible, (iii) intercompany activity was  
14 generally not transacted directly between the individual properties, but rather through the pooling  
15 of funds at the PFI/PISF corporate level and then redistributing the cash needed to the individual  
16 properties, (iv) funds were commonly commingled during the property purchasing cycle and  
17 during each property’s operating cycle, and (iv) the investments and financial transactions specific  
18 to LLC 28 and PFI Glenwood are inextricably entangled with those of the other entities within the  
19 PFI Enterprise.<sup>10</sup> These circumstances clearly show a disregard of corporate formalities and the  
20 commingling of the assets of the Debtors, LLC 28, and PFI Glenwood.

21 Similarly, the evidence is overwhelming that the benefits of substantive consolidation  
22 outweigh any harm that might be caused. The Plan represents a negotiated settlement between the  
23 Debtors’ key Investor constituencies and substantive consolidation is a key component of that  
24 settlement. Such consolidation is broadly supported by the Investors and the Debtors other  
25 creditors as shown by the fact that no party objected to the SubCon Motion and that nearly 99.8%  
26 of ballots cast voted to accept the Plan.

27  
28 <sup>10</sup> The entire Alfaro Declaration is hereby incorporated into this Memorandum as if fully set forth herein.

1 In addition, the only outside Investor in LLC 28 (The Belline Family Trust dated February  
2 20, 2015) is party to a stipulation with the Debtors and the OCUC filed on May 12, 2021 as Dkt.  
3 No. 628 (the “Stipulation”) in which it agrees, among other things, that it would not oppose  
4 confirmation of the Plan and that it would vote its ballots pertaining to investments in the Debtors  
5 in favor of the Plan. This Court entered an order approving the Stipulation on May 12, 2021 as  
6 Dkt. No. 630 and the The Belline Family Trust timely voted its ballots to accept the Plan.

7 Similarly, the only outside Investor in PFI Glenwood, Peter Zabelin, timely voted his  
8 ballots pertaining to investments in the Debtors in favor of the Plan.

9 This level of support for the Plan by all the key Investors that would be most affected by  
10 substantive consolidation is resounding evidence that the benefits that substantive consolidation  
11 outweigh its potential harms.

#### 12 IV. CONCLUSION

13 For the reasons stated above, the Plan meets all of the requirements of Bankruptcy Code  
14 section 1129 and should be confirmed. The Plan Proponents request the Court to issue an order  
15 confirming the Plan in the form attached hereto as Exhibit A.

16 Dated: May 20, 2021

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

18 By /s/ Ori Katz

19 Ori Katz

20 J. Barrett Marum

21 Attorneys for the Debtors

22 Dated: May 20, 2021

PACHULSKI STANG ZIEHL & JONES LLP

24 By /s/ Debra Grassgreen

25 Debra Grassgreen

26 John D. Fiero

Cia H. Mackle

27 Attorneys for the Official Committee of  
28 Unsecured Creditors

**EXHIBIT A**

**(Proposed Order Confirming Plan)**

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**UNITED STATES BANKRUPTCY COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

In re:

PROFESSIONAL FINANCIAL  
INVESTORS, INC., *et al.*,

Debtors.

Chapter 11

Case No. 20-30604

(Jointly Administered)

**[PROPOSED] ORDER CONFIRMING  
SECOND AMENDED JOINT CHAPTER 11  
PLAN OF PROFESSIONAL FINANCIAL  
INVESTORS, INC. AND ITS AFFILIATED  
DEBTORS PROPOSED BY THE DEBTORS  
AND OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS AND  
SUPPORTED BY THE AD HOC LLC  
MEMBERS COMMITTEE AND THE AD HOC  
DOT NOTEHOLDERS COMMITTEE (DATED  
MAY 20, 2021)**

Plan Confirmation Hearing:

Date: May 27, 2021

Time: 10:00 a.m. (Pacific Time)

Place: **Telephonic/Video Appearances Only**  
450 Golden Gate Avenue, 16th Floor  
San Francisco, CA 94102

Judge: Hon. Hannah L. Blumenstiel

1  
2 On May 27, 2021, at approximately 10:00 a.m., this Court held a hearing (the  
3 “Confirmation Hearing”) on confirmation of the *Second Amended Joint Plan of Professional*  
4 *Financial Investors, Inc. and its Affiliated Debtors Proposed by the Debtors and Official*  
5 *Committee of Unsecured Creditors and Supported by the Ad Hoc LLC Members Committee and*  
6 *the Ad Hoc DOT Noteholders Committee (Dated May 20, 2021)* filed on May 20, 2021 (as  
7 amended or modified to date, the “Plan”) by plan proponents Professional Financial Investors, Inc.  
8 (“PFI”) and its affiliated debtors and debtors in possession (collectively, with PFI, the  
9 “Debtors”)<sup>11</sup> and the Official Committee of Unsecured Creditors (the “OCUC” and together with  
10 the Debtors, the “Proponents”).

11 The Court, having considered the Plan, all declarations, pleadings, and evidence submitted  
12 in support of the Plan; the *Limited Objection of Christina Ensign, Felix Arts and Carol Sue*  
13 *Sproule to Confirmation of Chapter 11 Plan* filed on May 13, 2021, as Docket No. 636 (the  
14 “Limited Objection”); all other relevant facts, pleadings, and evidence of record in the Chapter 11  
15 Cases; and the arguments of counsel at the Confirmation Hearing, issued detailed findings of fact  
16 and conclusions of law on the record at the Confirmation Hearing, which constitute the Court’s  
17 findings of fact and conclusions of law for the purposes of Federal Rule of Bankruptcy Procedure  
18 7052, as made applicable to this contested matter by Federal Rule of Bankruptcy Procedure 9014,  
19 and which findings of fact and conclusions of law are incorporated herein by this reference.

20 For the reasons stated by the Court on the record at the Confirmation Hearing, and for  
21 good cause appearing therefore,

22 **IT HAS BEEN DETERMINED BY THE COURT THAT:**

23 **A. Jurisdiction and Venue.** This Court has jurisdiction to confirm the Plan pursuant  
24 to 28 U.S.C. §§ 1334 and 157. The Confirmation Hearing is a core proceeding under 28 U.S.C. §  
25 157(b)(2)(L) and venue of the Bankruptcy Case in the Northern District of California is proper  
26 under 28 U.S.C. § 1408.

27 <sup>11</sup> A complete list of the Debtors and their respective chapter 11 case numbers may be found at  
28 [www.donlinrecano.com/pfi](http://www.donlinrecano.com/pfi). The federal tax identification numbers of each of the Debtors is also available in the  
bankruptcy petitions of each Debtor, also available at the Donlin Recano website.

1           **B.     Notice of Confirmation Hearing.** Due and sufficient notice of the Confirmation  
2 Hearing has been provided under the circumstances and under applicable rules and consistent with  
3 the requirements imposed by this Court in its *Order (I) Approving the Plan Summary and*  
4 *Conditionally Approving Disclosure Statement; (II) Scheduling Combined Hearing on Approval of*  
5 *Disclosure Statement and Confirmation of Plan and Approving the Form and Manner of Service*  
6 *of the Combined Hearing Notice; (III) Establishing Non-Investor Bar Dates for Filing Proofs of*  
7 *Claim; (IV) Approving Form and Manner of Notice of Non-Investor Bar Dates; (V) Establishing*  
8 *Procedures for the Solicitation and Tabulation of Votes on Plan; and (VI) Approving Related*  
9 *Matters* entered on April 9, 2021, as Docket No. 575 (the “Solicitation Procedures Order”).

10           **C.     Voting on Plan.** The Solicitation Procedures Order fixed May 13, 2021, at 4:00  
11 p.m. Pacific Time as the deadline to submit ballots to accept or reject the Plan. The Proponents  
12 have tabulated the ballots received, as evidenced by the Declaration of John Burlacu filed on May  
13 20, 2021 as Dkt. No. [\_\_\_\_\_] (the “Burlacu Declaration”) and the Final Tabulation Results  
14 attached as Exhibit A thereto (the “Final Tabulation Results”). As set forth in the Burlacu  
15 Declaration, out of 2,193 timely ballots cast, a total of 2,188 voted to accept the Plan and only five  
16 (5) voted to reject the Plan.

17           **D.     Objections.** No formal objections to the Plan other than the Limited Objection  
18 were filed.

19           **E.     Compliance with Confirmation Requirements of Bankruptcy Code Sections**  
20 **1123, 1129, 1181, 1190 and 1191.** The Plan, as modified by this Order, complies with the  
21 applicable requirements of sections 1123, 1129, 1181, 1190, and 1191 of the Bankruptcy Code,  
22 which set forth the conditions necessary for confirmation. In particular, the Plan is fair and  
23 equitable pursuant to Bankruptcy Code sections 1191(b) and (c).

24           **F.     Settlement of Claims and Controversies.** Pursuant to Bankruptcy Code sections  
25 1123(a)(5), 1123(b)(3), and 1123(b)(6), as well as Bankruptcy Rule 9019, and in consideration for  
26 the Distributions and other benefits provided under the Plan, the provisions of the Plan constitute a  
27 good faith compromise and settlement of all claims and controversies relating to the rights that a  
28 Holder of a Claim or an Equity Interest may have against any Debtor with respect to any Claim,

1 Equity Interest, or any Distribution on account thereof, as well as of all potential Intercompany  
2 Claims, Intercompany Liens, and Causes of Action against any Debtor. The compromise and  
3 settlement of all such claims or controversies are (i) in the best interest of the Debtors, the Estates,  
4 and their respective property and stakeholders; and (ii) fair, equitable, and reasonable

5 **G.** Based upon the record of the Confirmation Hearing, all the proceedings held before  
6 this Court in these Bankruptcy Cases, and the foregoing findings of fact and conclusions of law,

7 **IT IS HEREBY ORDERED THAT:**

8 **A. Confirmation of the Plan**

9 1. The Plan and each of its provisions (whether or not specifically approved herein) is  
10 hereby APPROVED and CONFIRMED in all respects, as modified herein; *provided, however,*  
11 that if there is any direct conflict between the terms of the Plan and the terms of this Order, the  
12 terms of this Order shall control. All objections and responses to, and statements regarding, the  
13 Plan, to the extent that they have not been withdrawn, waived, or settled prior to the entry of this  
14 Order or are not cured by the relief granted herein, are hereby expressly overruled.

15 2. The Limited Objection is OVERRULED in its entirety.

16 **B. Conditions Precedent**

17 3. The Effective Date shall not occur and the Plan shall not be consummated unless  
18 and until each of the conditions set forth in Section 8.1 of the Plan have been satisfied or duly  
19 waived pursuant to Section 8.2 of the Plan

20 4. Notwithstanding Bankruptcy Rule 3020(e), and to the extent applicable,  
21 Bankruptcy Rules 7062 and 9014, this Order is not subject to any stay, and the Plan shall become  
22 effective at the option of the Debtors at any time in their sole discretion following (i) entry of this  
23 Order, and (ii) satisfaction of the requirements set forth in the preceding paragraph 3 of this Order.

24 **C. Successors and Assigns**

25 5. The terms of this Order are binding on the Debtors, any and all holders of Claims  
26 and Interests (irrespective of whether such Claims or Interests are impaired under the Plan or  
27 whether the holders of such Claims or Interests accepted, rejected or are deemed to have acted or  
28 rejected the Plan), any and all non-debtor parties to executory contracts and unexpired leases with

1 the Debtors and any and all entities who are parties to or are subject to the settlements,  
2 compromises, releases, discharges and injunctions set forth in the Plan and the respective heirs,  
3 executors, administrators, successors or assigns, if any, of any of the foregoing.

4 **D. Substantive Consolidation**

5 6. On the Effective Date, PFI, PISF, the LLC/LP Debtors, Professional Investors 28,  
6 LLC, and PFI Glenwood LLC (collectively, the “Consolidated Estates”) shall be substantively  
7 consolidated pursuant to sections 105(a), 541, 1123, and 1129 of the Bankruptcy Code. As a  
8 result of such substantive consolidation, on the Effective Date, all property, rights and claims of  
9 the Consolidated Estates and all Claims against the Consolidated Estates shall be deemed to be  
10 pooled for purposes of distributions under the Plan and, in the PFI Trustee’s discretion, other  
11 purposes. Further, as a result of such substantive consolidation, all claims between and among the  
12 Consolidated Estates shall be cancelled, subject to any Alternative Restructuring Transactions;  
13 provided, however, that (i) while all Debtors shall be substantively consolidated for purposes of  
14 distribution to creditors, such that all Investors shall have claims against a single pool of the  
15 Debtors’ consolidated assets, the actual substantive consolidation of entities, particularly for tax  
16 purposes, shall be at the option of the Debtors or the PFI Trust, and subject to any Alternative  
17 Restructuring Transactions, and (ii) any and all TIC Interests in the Real Properties that are held  
18 by any Debtor shall not be substantively consolidated.

19 **E. Vesting of Assets**

20 7. On the Effective Date, and subject to Section 2.2 of the Plan, the PFI Trust shall be  
21 automatically vested with all of the Debtors’ and the Estates’ respective rights, title, and/or interest  
22 in and to all PFI Trust Assets, and the OpCo shall be automatically vested with all of the Debtors’  
23 and the Estates’ respective rights, title and/or interest in and to all OpCo Assets. Except as  
24 specifically provided in the Plan or this Order, in accordance with Bankruptcy Code section 1141,  
25 the PFI Trust Assets, the OpCo Assets and any other assets shall automatically vest in the PFI  
26 Trust and the OpCo, as applicable, free and clear of all Claims, Liens, or interests (including,  
27 without limitation, any and all DOT Noteholders’ Deeds of Trust), subject only to the PFI Trust  
28 Interests and the PFI Trust Expenses, as provided for in the PFI Trust Agreement, and such

1 vesting shall be exempt from any stamp, real estate transfer, other transfer, mortgage reporting,  
2 sales, use, or other similar tax. The PFI Trustee shall be the exclusive trustee of the PFI Trust  
3 Assets (including all ownership interests in the OpCo) for purposes of 31 U.S.C. § 3713(b) and 26  
4 U.S.C. § 6012(b)(3), as well as the representative of the Estates appointed pursuant to Bankruptcy  
5 Code section 1123(b)(3) regarding all PFI Trust Assets, the OpCo and the OpCo Assets. The PFI  
6 Trust shall hold and distribute the PFI Trust Assets and shall collect and distribute all proceeds  
7 from the operations and/or sale of the OpCo and the OpCo Assets in accordance with the  
8 provisions of the Plan and the PFI Trust Agreement.

9 **F. Expungement of DOT Noteholder Liens**

10 8. The liens of the DOT Noteholders shall be expunged from the record of the Real  
11 Properties, or the sale proceeds thereof, with such expungement to become effective with respect  
12 to each Real Property, or the sale proceeds thereof, on the later of the thirtieth (30th) day after  
13 entry of this Order or the date of entry of a final order adjudicating an Avoidance Action with  
14 respect to a lien on any given Real Property or the sale proceeds thereof. Any DOT Noteholder  
15 that wishes to challenge the expungement of its lien shall file an objection with this Court and  
16 serve its objection on the PFI Trustee and counsel for the Proponents and Ad Hoc Committees no  
17 later than twenty (20) days after entry of this Order. The Debtors or PFI Trustee, as applicable,  
18 shall file the Avoidance Action no later than thirty (30) days after service of any such objection.

19 **G. Executory Contracts and Unexpired Leases**

20 9. On the Effective Date, the Debtors shall assume all executory contracts and  
21 unexpired leases that are listed on the Schedule of Assumed Agreements, and shall assign such  
22 contracts and leases to the PFI Trust or the OpCo, as appropriate. The Debtors shall have the right  
23 to amend the Schedule of Assumed Agreements at any time prior to the Effective Date, in the  
24 Debtors' reasonable discretion after consultation with each of the Committees. The Debtors shall  
25 provide notice of any amendment to the Schedule of Assumed Agreements to the party or parties  
26 to those agreements affected by the amendment.

27 10. On the Effective Date all executory contracts and unexpired leases of the Debtors  
28 shall be rejected except for (i) executory contracts and unexpired leases that have been previously

1 assumed or rejected by the Debtors, (ii) all executory contracts and unexpired leases specified as  
2 to be assumed in paragraph 7 above (including all contracts and leases set forth in the Schedule of  
3 Assumed Agreements, as may be amended), and (iii) any agreement, obligation, security interest,  
4 transaction, or similar undertaking that the Debtors believe is not executory or a lease, but that is  
5 later determined by this Court to be an executory contract or unexpired lease that is subject to  
6 assumption or rejection under Bankruptcy Code section 365.

7 11. Any Rejection Claim or other Claim for damages arising from the rejection under  
8 the Plan of an executory contract or unexpired lease must be Filed and served no later than the  
9 Rejection Claims Bar Date. Any such Rejection Claims that are not timely Filed and served will  
10 be forever disallowed, barred, and unenforceable, and Persons holding such Claims will not  
11 receive and be barred from receiving any Distributions on account of such untimely Claims. If  
12 one or more Rejection Claims are timely Filed pursuant to the Plan, the PFI Trust may object to  
13 any Rejection Claim on or prior to the Claim Objection Deadline. For the avoidance of doubt, the  
14 Rejection Claims Bar Date established by the Plan does not alter any rejection claims bar date  
15 established by a prior order of this Court with respect to any executory contract or unexpired  
16 leases that was previously rejected in these Chapter 11 Cases.

17 **H. Preservation of Causes of Action**

18 12. Except as otherwise provided in the Plan or the Order (including in the Investor  
19 Claims Special Provisions), from and after the Effective Date, the PFI Trust will retain all rights to  
20 institute, commence, file, pursue, prosecute, enforce, abandon, settle, compromise, release, waive,  
21 dismiss, or withdraw, as appropriate, (a) any and all of the Debtors' or Estates' Causes of Action,  
22 (b) Causes of Action that are Contributed Claims (whether existing as of the Petition Date or  
23 thereafter arising), and (c) all Avoidance Actions, all as PFI Trust Actions, in each case in any  
24 court or other tribunal, including in an adversary proceeding Filed in the Chapter 11 Cases, subject  
25 to the requirements set forth in the Plan and the PFI Trust Agreement.

26 13. The PFI Trust shall have the exclusive right, power, and interest on behalf of itself,  
27 the Debtors, the Estates, and the Contributing Claimants to, enforce, sue on, settle, compromise,  
28 transfer, or assign (or decline to do any of the foregoing) any or all of the PFI Trust Actions

1 without notice to or approval from this Court, subject to the PFI Trust Agreement. In accordance  
2 with the Plan, without any further notice to or action, order, or approval of this Court, from and  
3 after the Effective Date, the PFI Trust may compromise and settle PFI Trust Actions, subject to  
4 the PFI Trust Agreement.

5 14. The failure to specifically identify in the Disclosure Statement (including the  
6 exhibits and schedules thereto) or the Plan any potential or existing Avoidance Actions or Causes  
7 of Action as a PFI Trust Action shall not limit the rights of the PFI Trust to pursue any such  
8 Avoidance Actions or Causes of Action. Unless a PFI Trust Action is expressly waived,  
9 relinquished, released, compromised, or settled in the Plan or any Final Order (including this  
10 Order), the Debtors have expressly reserved such PFI Trust Actions for later resolution by the PFI  
11 Trust (including any Avoidance Actions or Causes of Action not specifically identified or of  
12 which the Debtors may presently be unaware or that may arise or exist by reason of additional  
13 facts or circumstances unknown to the Debtors at this time or facts or circumstances that may  
14 change or be different from those the Debtors now believe to exist). As such, no preclusion  
15 doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim  
16 preclusion, waiver, estoppel (judicial, equitable, or otherwise), or laches will apply to any such  
17 Avoidance Actions or Causes of Action upon or after Confirmation of the Plan based on the  
18 Disclosure Statement, the Plan, or this Order, except when such Avoidance Actions or Causes of  
19 Action have been expressly released. In addition, the right to pursue or adopt any claims alleged in  
20 any lawsuit in which any Debtor, the PFI Trust, or the OpCo is a plaintiff, defendant, or an  
21 interested party is fully reserved as against any Person that is not a Released Party, including the  
22 plaintiffs or co-defendants in such lawsuits.

23 **I. Actions in Furtherance of the Plan**

24 15. The Proponents and the PFI Trustee are authorized to: (a) take any and all such  
25 actions as may be necessary or appropriate to implement, effectuate, and consummate the Plan in  
26 accordance with its terms as modified by this Order; and (b) execute any and all such documents  
27 and instruments as may be required to effectuate the Plan.

1 **J. Releases**

2 16. Any releases contained in the Plan are approved in all respects. The  
3 commencement or prosecution by any entity, whether directly, derivatively or otherwise, of any  
4 claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action or  
5 liabilities released pursuant to the Plan are permanently enjoined.

6 **K. Non-Discharge of the Debtors; Property Free and Clear**

7 17. In accordance with Bankruptcy Code section 1141(d)(3)(A), the Plan does not  
8 discharge the Debtors. Bankruptcy Code section 1141(c) nevertheless provides, among other  
9 things, that the property dealt with by the Plan, including, without limitation, the Real Properties,  
10 is free and clear of all Claims and Equity Interests against the Debtors, except as otherwise  
11 provided with respect to the Non-Investor First-Priority Lenders in Section 2.2 of the Plan. As  
12 such, no Person holding a Claim (other than the Non-Investor First-Priority Lenders as provided in  
13 Section 2.2 of the Plan) or an Equity Interest may receive any payment from, or seek recourse  
14 against, any assets that are to be distributed under the Plan other than assets required to be  
15 distributed to that Person under the Plan.

16 **L. Injunction**

17 18. As of the Effective Date, all Persons are precluded and barred from asserting  
18 against any property to be distributed under the Plan any Claims, rights, Causes of Action,  
19 liabilities, Equity Interests, or other action or remedy based on any act, omission, transaction, or  
20 other activity that occurred before the Effective Date except as expressly provided in the Plan or  
21 this Order. The foregoing discharge, release and injunction are an integral part of the Plan and are  
22 essential to its implementation.

23 19. Notwithstanding any provision in the Plan to the contrary or an abstention from  
24 voting on the Plan, no provision of the Plan, or this Order: (i) releases any non-debtor person or  
25 entity from any claim or cause of action of the SEC; or (ii) enjoins, limits, impairs, or delays the  
26 SEC from commencing or continuing any claims, causes of action, proceedings, or investigations  
27 against any non-debtor person or entity in any forum.

1 **M. Term of Injunctions or Stays**

2 20. Unless otherwise provided in the Plan, all injunctions or stays in the Chapter 11  
3 Cases under Bankruptcy Code sections 105 or 362 or otherwise, and extant as of the Confirmation  
4 Hearing (excluding any injunctions or stays contained in or arising from the Plan or the Order),  
5 shall remain in full force and effect through and inclusive of the Effective Date and thereafter shall  
6 automatically terminate unless otherwise ordered by this Court, at which time they are replaced  
7 with the injunction set forth in Section J above.

8 **N. Payment of Statutory Fees**

9 All fees payable pursuant to 28 U.S.C. § 1930, shall be paid by the Debtors on or before  
10 the Effective Date. All such fees that arise after the Effective Date shall be paid by the PFI Trust.

11 **O. Reference to and Validity and Enforceability of the Plan Provisions**

12 21. The failure to reference any particular provision in the Plan in this Order shall have  
13 no effect on the binding effect, enforceability or legality of such provision and such provision  
14 shall have the same binding effect, enforceability or legality as every other provision of the Plan.  
15 Each term and provision of the Plan, as modified or interpreted by the Court, is valid and  
16 enforceable pursuant to its terms.

17 **P. Notice of Entry of Confirmation Order**

18 22. Pursuant to Bankruptcy Rules 2002(f)(7) and 3020(c), the Debtors are hereby  
19 directed to serve a notice of the entry of this Order, and if it has occurred, the Effective Date, on  
20 all parties that received notice of the Confirmation Hearing, no later than 15 Business Days after  
21 the date of this Order; *provided, however*, that the Debtors shall be obligated to serve the such  
22 notice only on the record holders of Claims and Interests.

23 **Q. SEC Related Provisions**

24 23. Nothing in the Plan or this Order constitutes a determination as to whether any  
25 claim by the SEC for disgorgement or civil penalties is entitled to be subordinated to payment of  
26 general unsecured claims, notwithstanding the definition of Other Subordinated Claims in the  
27 Plan. Further, the SEC shall retain the right, at any time after the Effective Date, to amend any  
28 timely filed proofs of claim to assert such claims in specific dollar amounts.

1 **R. Retention of Jurisdiction**

2 24. This Court shall retain jurisdiction to the fullest extent permitted by the Plan and  
3 applicable law to enforce, implement, interpret and resolve issues and disputes with respect to the  
4 Plan and all matters related to the Plan.

5 **\*\*END OF ORDER\*\***

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## Court Service List

Registered ECF Participants only.